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IN THE

Supreme Court of the United States

October Term, 1971

No. 362

ELIZABETH M. PURCELL,
Respondent

v.

MARION STANLEY KAPELSKI,
Petitioner

and

KATHLEEN M. LAPHAN and
KATHRYN L. LAPHAN,
Respondents

BRIEF OF RESPONDENT, ELIZABETH M. PURCELL, IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit	1
Citation to Opinions Below	2
Questions Presented	2
Statement of the Case	3
Reasons for Denying Writ	5
Conclusion	8

TABLE OF CITATIONS

Cases:	Page
Immer v. Risko, 56 N. J. 482, 267 A.2d 481 (1970)	5
Johnson v. Peoples First National Bank and Trust Co., 394 Pa. 116 (Supreme Court of Pennsylvania, 1958)	6, 8
Koplik v. C. P. Truck Corp., 27 N. J. 1 (1958)	6
Marshall v. Geo. M. Brewster & Son, Inc., 37 N. J. 176 (1962)	6
Mullane v. Stavola, 101 N. J. Super. 184 (1968)	6
Pfau v. Trent Aluminum Co., 55 N. J. 511 (1970)	6
Sanchez v. Olivarez, 94 N. J. Super. 61, 226 A.2d 752 (1967)	5
Swaney v. Cabot, 23 Fayette Legal Journal 175 (Court of Common Pleas, Fayette County, Pennsylvania, 1960)	6
Van Dyke v. Bolves, 107 N. J. Super. 338 (1969)	6

Statute:	
28 U.S.C. § 1292(b)	4

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Justices of the said Court:

Respondent respectfully prays that a Writ of Certiorari be denied to review the Judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on May 24, 1971, petition of re-hearing of said case being denied by the United States Court of Appeals for the Third Circuit on June 30, 1971.

CITATION TO OPINIONS BELOW

The opinion of the District Court for the District of New Jersey is unreported and is printed in Appendix A, pages 8 to 13. The opinion of the Court of Appeals for the Third Circuit is reported at 444 F.2d 380 (1971).

QUESTIONS PRESENTED

Whether in a suit between respondent, Elizabeth M. Purcell, and petitioner, Marion Stanley Kapelski, former spouses, and respondents, Laphans, New Jersey residents, New Jersey will apply its own laws allowing suits between divorced spouses.

Whether the law of Pennsylvania allows suits between divorced spouses for torts committed during marriage.

STATEMENT OF THE CASE

The petitioner, Marion Stanley Kapelski, was the operator of a motor vehicle in which his then wife, respondent, Elizabeth M. Purcell, was a passenger when it was involved in a collision with a motor vehicle owned by respondent, Kathryn L. Laphan, and operated by respondent, Kathleen M. Laphan. The accident occurred in New Jersey on January 21, 1966. Also injured in the accident was a passenger in petitioner's car, a Mary Raubert, not a party to this action.

At the time of the accident, petitioner, Kapelski, and respondent, Purcell, were husband and wife residing in the Commonwealth of Pennsylvania. The other respondents, the Laphans, were and still are citizens and residents of the State of New Jersey. At the time that suit was filed, on November 8, 1967, in the United States District Court for the District of New Jersey, petitioner, Kapelski, was a resident of California and respondent, Purcell, was still a Pennsylvania resident. The parties were no longer husband and wife having been divorced on September 28, 1967 by Decree from the Court of Common Pleas of Delaware County, Pennsylvania. The respondent, Purcell, remarried on April 3, 1969.

Suit was commenced by respondent, Purcell, against petitioner and the other respondents herein. Petitioner filed a crossclaim for contribution against the other respondents, the Laphans.

The other passenger in the petitioner's automobile, Mary Raubert, commenced suit in the Superior Court of New Jersey against the petitioner and all the respondents.[1] At the time of trial in the passenger's state court case, a jury found that the petitioner, Kapelski, was negligent and the respondents, Laphans, were not negligent (A. 13).

1. Mary Raubert v. Marion Stanley Kapelski, Elizabeth M. Kapelski, Kathleen Laphan, Kathryn Laphan, Superior Court of New Jersey, Law Division, Camden County, New Jersey, Docket No. L-9655-66.

Respondent, Purcell, was found by the Court to be not responsible for the accident.

Because of the above jury finding in the passenger's case, the parties herein filed several motions in the instant case. Respondent, Purcell, filed a Motion for Summary Judgment against the petitioner, Kapelski, on the basis that the issue of negligence having been already determined was res adjudicata which motion was granted by the District Court on February 26, 1970 (A. 22). A Motion for Partial Summary Judgment was filed by the respondents, Laphans, against the cross-claim of petitioner, Kapelski, which was also granted on February 26, 1970. Finally, a motion was filed by the petitioner, Kapelski, to dismiss the complaint on the basis that Pennsylvania law should be applied which does not allow suits between divorced spouses for torts committed during the marriage. On February 26, 1970, petitioner's Motion to Dismiss was denied by the Court below and this Order was certified by the Court as a controlling question of law allowing an immediate appeal pursuant to 28 U.S.C. § 1292(b) (A. 22, 23).

The United States Court of Appeals for the Third Circuit granted petitioner, Kapelski, leave to appeal on March 26, 1970 by Order of the Honorable William H. Hastie, Chief Judge (A. 24). The matter was argued orally before Circuit Judges McLaughlin, Freedman and Van Dusen on October 22, 1970. Judge Freedman died on March 13, 1971 and Judge Rosenn was assigned on April 13, 1971 to replace Judge Freedman. The Court of Appeals for the Third Circuit, in a per curiam decision, Judge McLaughlin dissenting, affirmed the Order of the District Court denying the motion of petitioner, Kapelski, to dismiss the complaint as to him. 444 F.2d 380.

On June 30, 1971, the Court of Appeals for the Third Circuit, Judges McLaughlin and Gibbons dissenting, denied petitioner, Kapelski's, Petition for Rehearing (A. 26).

REASONS FOR DENYING WRIT

The majority opinion of the Court of Appeals for the Third Circuit, in the instant case, 444 F.2d 380, is completely consistent with the New Jersey law governing the conflict of laws principles and the New Jersey policy allowing suits between divorced spouses for torts occurring during marriage, *Sanchez v. Olivarez*, 94 N. J. Super. 61, 226 A.2d 752 (1967); or allowing suits between spouses for torts committed prior to their marriage, *Immer v. Risko*, 56 N. J. 482, 267 A.2d 481 (1970). The majority opinion of the Court of Appeals in the instant case did not rely on the decisions in *Sanchez v. Olivarez*, supra, or *Immer v. Risko*, supra, but relied on the rationale behind these decisions in determining the strong public policy of the New Jersey courts in denying interspousal immunity in those situations. As stated below:

> "After carefully considering the history of the rationale underlying interspousal immunity, and its gradual erosion in the New Jersey courts, the highest court of New Jersey made it clear that as a matter of public policy it would not permit one who has been injured by the negligence of another in the operation of an automobile to be barred from obtaining redress on the ground that, when recovery in tort is sought, the parties are married or have been previously married. . . . The broad scope of the new rules announced in *Immer* . . . also reflected the strength of the New Jersey public policy in this area, which strength indicates that the New Jersey courts would be likely to apply this policy to any actions brought in the courts of that state in situations similar to those presented by this record." 444 F.2d 380 at pages 382, 383.

Faced with a true conflict of laws question, the New Jersey courts have applied its own laws in the following situations: (1) where the law of the other state is procedural [*Marshall v. Geo. M. Brewster & Son, Inc.*, 37 N. J. 176 (1962), where the accident occurred in Pennsylvania which had a one year statute of limitation and suit was brought in New Jersey which had a two year statute of limitation. The Court held that since the Pennsylvania statute was procedural, the New Jersey two year statute of limitations would be applied instead] ; (2) where the public policy of New Jersey was not relevant to the public policy of the other state [*Pfau v. Trent Aluminum Co.*, 55 N. J. 511 (1970), where plaintiff, a Connecticut domiciliary, was injured in Iowa by an automobile driven by a New Jersey defendant owned by another New Jersey defendant. Iowa had a guest statute prohibiting suits for ordinary negligence whereas New Jersey had no such prohibition. The Court determined that one of the public policies of Iowa behind the guest statute was to reduce litigation in the Iowa courts. The Court determined that this policy was not relevant in a suit brought in a New Jersey state court] ; and (3) where New Jersey had a paramount interest in protecting its own residents [*Van Dykes v. Bolves*, 107 N. J. Super. 338 (1969); *Mullane v. Stavola*, 101 N. J. Super. 184 (1968); *Koplick v. C. P. Truck Corp.*, 27 N. J. 1 (1958)]

Were the New Jersey courts to apply the above criteria to the instant case, they would find that Pennsylvania considers the defense of immunity of suit to be procedural, *Johnson v. Peoples First National Bank and Trust Co.*, 394 Pa. 116 (Supreme Court of Pennsylvania, 1958); and that one of the reasons for the alleged interspousal immunity is to reduce litigation in the Pennsylvania courts, *Swaney v. Cabot*, 23 Fayette Legal Journal 175 (Court of Common Pleas, Fayette County, Pennsylvania, 1960). As stated above, the New Jersey courts have been faced with the same factual situations and have rejected the other state's laws in favor of its own.

Perhaps the most compelling reason that the New Jer-

sey courts would apply its own law allowing this suit to be brought is the overriding interest that New Jersey has in protecting the rights of the other respondents, Laphans, who are still New Jersey residents. As stated previously, the Laphans have been found not negligent and the petitioner, Kapelski, negligent in a previous case litigated in the Superior Court of New Jersey by a passenger against all of the parties herein. Part of the Order from which no appeal was taken granted the respondents, Laphans', Motion for Partial Summary Judgment in favor of the respondents, Laphans, against the cross-claim of the petitioner, Kapelski (A. 22). Because of the previous jury finding and the District Court's Order, New Jersey has the primary interest in protecting the rights of its own citizens and residents—the respondents, Laphans. Should the Court now dismiss the claim of the respondent, Purcell, against the petitioner, Kapelski, there would remain Purcell's claim against the Laphans only and the Laphans would lose their right of contribution against the petitioner, Kapelski. Such a result would frustrate the strong public policy of New Jersey in protecting its own citizens and abrogate a previous jury finding that petitioner was negligent and the respondents, Laphans, were not negligent for this accident. Pennsylvania's interest in this matter is hardly a passing one when weighed against New Jersey's already determined substantial interest. The Circuit Court recognized this fact when it stated:

> "In addition, had the Laphan sisters not already been adjudicated free from negligence, New Jersey would have an interest in protecting their right of contribution since they are its citizens, a right which would be jeopardized if the defendant spouse's motion to dismiss the main action were granted." 444 F.2d 380 at page 383.

In addition to all of the above, were the New Jersey Court to look to the law of Pennsylvania concerning interspousal immunity they would find that no appellate court of Pennsylvania has decided the question and, indeed,

if such were to be decided today, the Supreme Court of Pennsylvania would allow such suits. See *Johnson v. Peoples First National Bank and Trust Co.*, 394 Pa. 116 (1958).

CONCLUSION

For the reasons and argument set forth in the foregoing Brief and by reason of the majority opinion of the United States Court of Appeals for the Third Circuit, respondent, Elizabeth M. Purcell, respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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